The Public Lawyer

STATE BAR OF NEVADA

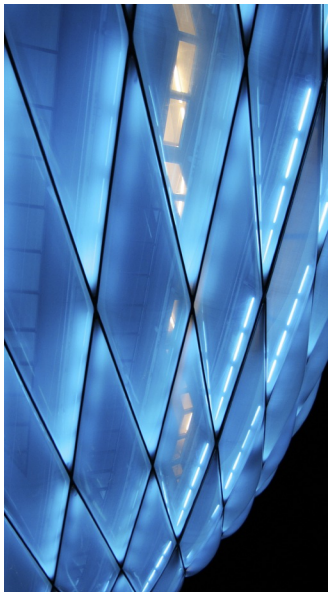
Public Lawyers Section

March 2011

Nevada Supreme Court Cases

J.E Dunn Nw, Inc. v. Corus Constr. Venture, LLC, 127 Nev. Adv. Op. No. 5 (March 3, 2011) In this appeal, we address four issues concerning the visibility requirement for a mechanic's lien to obtain priority over a deed of trust: (1) whether the visibility requirement contained in the definition of "commencement of construction" in NRS 108.22112 applies to both work performed and materials and equipment furnished to the construction site; (2) whether, in the 2003 amendments to NRS Chapter 108, the expansion of the definition of "work" to make preconstruction services lienable excuses the visibility requirement found in NRS 108.22112; (3) whether a lender with priority waives its superior position if it has actual knowledge of lienable preconstruction work; and (4) whether the placement of signs and removal of power lines constitutes visible work. We conclude that NRS 108.22112 plainly requires visibility of work performed, including preconstruction services, to establish priority. We also conclude that the 2003 amendments to NRS Chapter 108 did not affect the long-standing requirement that work must be visible on the property for a mechanic's lien to take priority over a deed of trust recorded before commencement of construction, and the statutory visibility requirement may not be waived by a lender who has actual knowledge of off-site preconstruction services. Finally, we conclude that the preparatory placement of signs and removal of power lines does not constitute visible work. In light of these conclusions, we affirm the district court's order granting Corus Bank's motion for summary judgment.

Ybarra v. State, 127 Nev. Adv. Op. No. 4 (March 3, 2011) A jury sentenced appellant Robert Ybarra, Jr., to death in 1981 for the murder of 16-year-old Nancy Griffith. Two decades later, the United States Supreme Court held in Atkins v. Virginia, 536 U.S. 304 (2002), that the Eighth Amendment's ban on cruel and unusual punishment precludes the execution of



Inside this issue:

Nevada Supreme Court Cases

mentally retarded persons. In compliance with Atkins, the Nevada Legislature adopted a statutory provision to address claims of mental retardation involving defendants who, like Ybarra, were sentenced to death before the decision in Atkins. NRS 175.554(5). Ybarra sought relief under that statute, asking the district court to set aside his death sentence on the ground that he is mentally retarded. In this appeal from the district court's order denying relief, we address two issues.

First, we consider whether the denial of Ybarra's motion to disqualify the post-conviction district court judge based on implied bias violated state and federal guarantees of due process. We conclude that it did not because neither the judge's prior legal representation of the victim's family on matters unrelated to the murder nor the case's notoriety in the judge's community would cause an objective person reasonably to question the judge's impartiality.

Second, we consider whether the district court erred in concluding that Ybarra had not demonstrated by a preponderance of the evidence that he was mentally retarded. NRS 174.098(7) defines "mentally retarded" as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." As matters of first impression, we address the three components of the mental retardation definition and, in particular, hold that the "developmental period" referenced in the statute includes the period before a person reaches 18 years of age. Because Ybarra failed to produce sufficient evidence of subaverage intellectual functioning and adaptive behavior deficits before he reached 18 years of age, the district court did not err in concluding that Ybarra had not demonstrated that he was mentally retarded and denying the motion to strike the death penalty.

Lamb v. State, 127 Nev. Adv. Op. No. 3 (March 3, 2011) Robert Lamb appeals his conviction of the first-degree murder of his sister, Susan. He identifies a multitude of errors, from his first encounter with the police, through pretrial proceedings, jury selection, and trial, to the mishandling of a jury note during deliberations and, finally, sentencing. For the reasons below, we conclude that: (1) the public safety exception to the Miranda rule made admissible Lamb's unwarned statement to the police that "I have a revolver but I found it"; (2) Lamb's claims of pervasive procedural, evidentiary, and instructional error fail; and (3) it was error for the bailiff to communicate with the jury concerning its question without notice to the parties, but in this case the error was nonprejudicial. We therefore affirm.

Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2 (February 10, 2011) In this appeal, we address the proper analysis to determine whether a forum selection clause applies to the tort claims pleaded by a plaintiff when the dispute is arguably related to a contract containing an applicable forum selection clause. We conclude that the best approach for resolving this issue is one that focuses first on the intent of the parties regarding a forum selection clause's applicability to contract-related tort claims. If that examination does not resolve the question, however, the district court must determine whether resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract. And if that analysis does not resolve the question, the district court must determine whether the plaintiff's contract-related tort claims involve the same operative facts as a parallel breach of contract claim. As the district court dismissed this case without the benefit of our guidance on this issue, we reverse the district court's judgment and remand this matter to

the district court for reexamination under the standard adopted today.

Dieudonne v. State, 127 Nev. Adv. Op. No. 1 (January 27, 2011) In this appeal, we consider whether a criminal defendant holds an absolute right to be sentenced by the judge who accepted his or her plea. We conclude that there is no such right absent an express agreement or indication by the defendant that the plea was entered with that expectation. In this case, there was no such express agreement, and we decline to imply one based on the judge's use of a personal pronoun during the plea canvass, particularly given the defendant's failure to object to proceeding with sentencing before a different judge. We also take this opportunity to reaffirm our holding in *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990), that witnesses offering oral victim impact statements must be sworn. While the victim impact witnesses in this case were not sworn, we cannot say that this error rises to the level of plain error warranting a new sentencing hearing. Accordingly, we affirm the judgment of conviction.

NINTH CIRCUIT CASES

Lopez v. Pacific Maritime Ass'n, No. 09-55698 (March 2, 2011) One of those policies is a "one-strike rule," which eliminates from consideration any applicant who tests positive for drug or alcohol use during the pre-employment screening process. Defendant notifies its applicants at least seven days in advance of administering the drug test. Failing the drug test, even once, disqualifies an applicant permanently from

Ninth Circuit Cases

future employment.

We recognize that the one-strike rule imposes a harsh penalty on applicants who test positive for drug use. As Defendant candidly concedes, many people question the rule's reasonableness in light of the fact that many people who use drugs later rehabilitate themselves, as Plaintiff exemplifies. But unreasonable rules do not necessarily violate the ADA or the FEHA. Because Plaintiff failed to establish that Defendant intentionally discriminated against him on the basis of his protected status or that the one-strike rule disparately affects recovered drug addicts, we affirm the summary judgment in favor of Defendant.

Lake Washington School Dist. No. 414 v. Office of Superintendent, No. 09-35472 (February 22, 2010) Shakespeare warned us to "defer no time, delays have dangerous ends." Perhaps Lake Washington School District no. 414 ("School District") took the Bard's advice a bit too seriously.

When a state administrative law judge granted a short continuance, the School District immediately filed this action seeking to enjoin the State of Washington from granting continuances greater than 45 days in any administrative proceedings conducted pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* The district court held that the School District lacked standing and dismissed the complaint with prejudice. We affirm.

In sum, we join our sister circuits in holding that a school district or other local educational agency has no express or implied private right of civil action under the IDEA to litigate any question aside from the issues raised in the complaint filed by the parents on behalf of their child. In this case, the school district lacks statutory standing to challenge the State of Washington's compliance with the IDEA's procedural protections. The district court correctly dismissed its complaint with prejudice.

International Church of the Foursquare Gospel v. City of San Leandro, No. 09-15163 (February 15, 2011) International Church of the Foursquare Gospel ("ICFG") appeals the grant of summary judgment in favor of the City of San Leandro (the "City"). ICFG alleges violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"), and asserts claims under 42 U.S.C. § 1983 for First and Fourteenth Amendment violations. ICFG contends that the City violated its rights by denying a rezoning application and a conditional use permit ("CUP") to its local affiliate, Faith Fellowship Foursquare Church ("the Church"), to build new church facilities on certain industrial land in the City, and that such a denial violated the "substantial burden" and "equal terms" provisions under RLUIPA.

We find that there is a triable issue of material fact regarding whether the City imposed a substantial burden on the Church's religious exercise under RLUIPA. We also decide that the City failed as a matter of law to prove a compelling interest for its actions. Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

Szajer v. City of Los Angeles, No. 08-57010 (February 11, 2011) This is a civil rights action filed by Helene and Zoltan Szajer (collectively, "Szajers"), owners and operators of the "L.A. Guns" gun shop in West Hollywood, against the City of Los Angeles ("City"), the Los Angeles

NINTH CIRCUIT CASES

Police Department ("LAPD"), and a number of individual LAPD officers (collectively "Appellees"). Following a "sting" operation wherein the Szajers purchased illegal firearms from the LAPD, officers searched the Szajers' gun shop and their personal residence, pursuant to a warrant obtained by LAPD Detective Michael Mersereau. The searches resulted in the discovery of illegal firearms and ammunition in both the gun shop and residence. The Szajers did not contest the validity of the warrant or seek to suppress the evidence obtained during the searches. As part of a plea agreement, the Szajers pled no contest to one count of possession of an illegal assault weapon found in their home.

The Szajers then filed this civil action, alleging that the LAPD executed an illegal search at the gun shop. Defendants filed a motion for summary judgment, which the district court granted and the Szajers now appeal. For the reasons set forth below, we affirm the district court's decision granting summary judgment.

The November 17 undercover operation was the only basis for finding probable cause to search both the gun shop and residence. Yet, the Szajers failed to challenge the search. Just as in *Whitaker*, if the Szajers prevailed on their Section 1983 claim, it would necessarily imply the invalidity of their state court convictions. Their civil claims necessarily challenge the validity of the undercover operation and in doing so imply that there was no probable cause to search for weapons. The conclusion that *Heck* bars such a challenge is buttressed by the fact that the Szajers have not set forth, either on appeal or to the district court below, any other basis for the discovery of the assault weapon found in their home, which formed the basis for their plea and conviction.

Fabrini v. City of Dunsmuir, No. 09-16292 (February 11, 2011) Plaintiff-Appellant David Fabbrini was sued by the City of Dunsmuir, California ("the City"), for his failure to sufficiently collateralize a municipal loan. The City's lawsuit included a request for declaratory relief regarding Fabbrini's obligations, as well as a fraud claim. Subsequently the City voluntarily dismissed that lawsuit. Fabbrini then filed a federal court action against the City and various City officials, alleging a § 1983 claim for malicious prosecution and a state law defamation claim.
Pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, the district court granted the City's motion to strike the defamation claim. In the same order, it denied the City's motion to dismiss the § 1983 malicious prosecution claim. The court then awarded attorney's fees to the City on the basis of the successful anti-SLAPP motion, and later granted summary judgment in favor of the City as to the § 1983 malicious prosecution claim. Fabbrini appeals the summary judgment ruling and the award of attorney's fees.

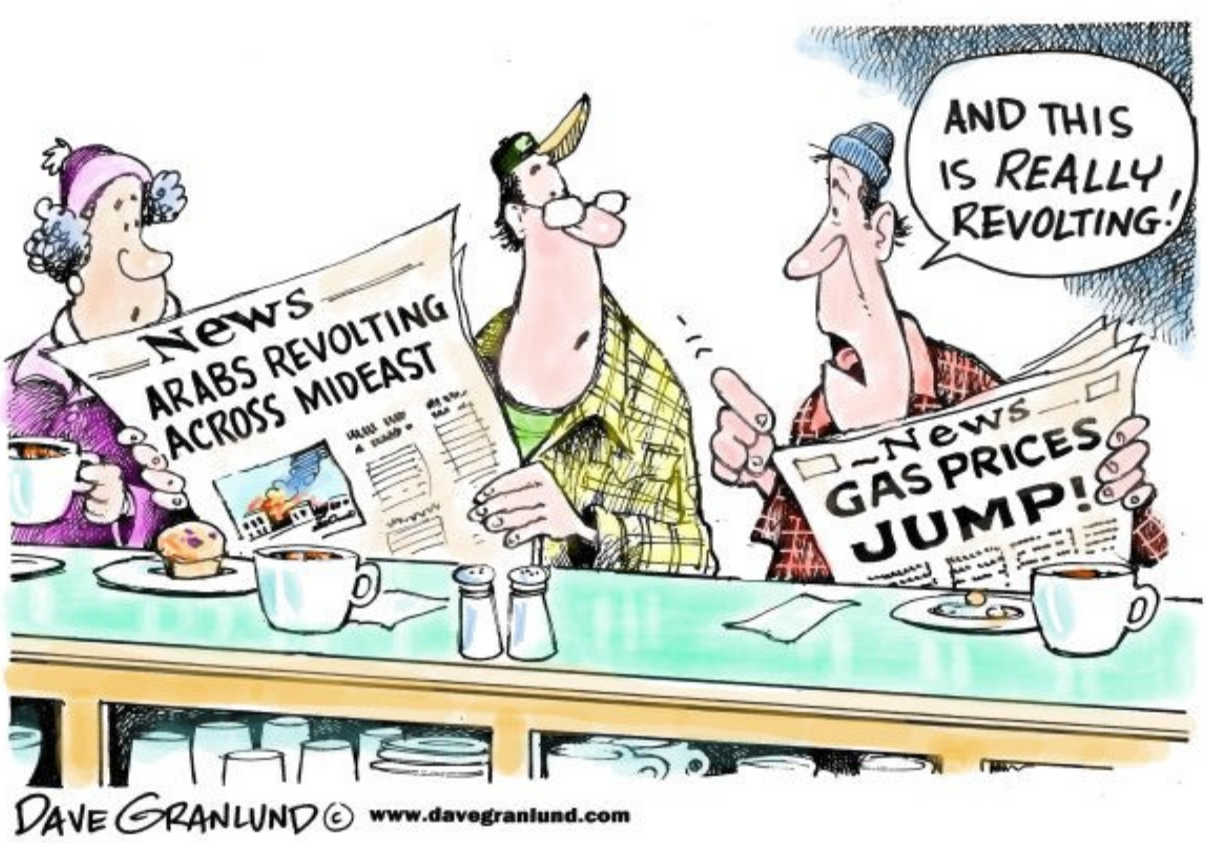
Starr v. Baca, No. 09-55233 (February 11, 2011) Plaintiff Dion Starr brings a § 1983 action for damages resulting from a violent attack he allegedly suffered while he was an inmate in the Los Angeles County Jail. The district court dismissed Starr's supervisory liability claim for deliberate indifference against Sheriff Leroy Baca in his individual capacity under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Because we hold that Starr has adequately stated a claim, we reverse and remand for further proceedings.

Mathis v. Glover, No. 08-17302 (February 1,

NINTH CIRCUIT CASES

2011) This case concerns the actions of Richard Glover, the Public Administrator of Lyon County, Nevada, after the death of Joe Mathis. Before us is an interlocutory appeal based only on the allegations in the complaint denying qualified immunity for Glover's actions in entering Joe Mathis's home without a warrant and failing to give notice to his sons before doing so. The complaint makes the following allegations. On May 29, 2008, the deputy sheriff entered Joe Mathis's home on a welfare check and found him dead. He sealed the residence with the property inside. He then notified James Mathis, one of Joe Mathis's three sons. One of the sons, Anthony Mathis, notified the deputy that he would be coming to Smith Valley, where his father's home is located, on the next available flight and would be arriving on June 1st.

On the evening of May 30th, the deputy contacted Glover in his capacity as Public Administrator and advised him of the death of Joe Mathis. He informed him of the identity of the three sons and that Anthony Mathis would be arriving on the following day, June 1st, to take care of his father's property and funeral. On May 31st, Glover entered the residence and carried away personal property, some of which he stored and some of which he sold.



The Mathis sons alleged that Glover and Lyon County violated their rights under the Fourth and Fourteenth Amendments of the United States Constitution, under the Nevada Constitution and for violations of Nevada state law.

NINTH CIRCUIT CASES

There was no extraordinary circumstance here and the failure to give notice and an opportunity to respond before Glover took the items from the house violated due process. Glover was not entitled to qualified immunity because the law was clearly settled.

King v. American Family Mut. Ins. Co., No. 08-35988 (January 31, 2011) Imagine this scenario: An out-of-state insurance company is contemplating doing business in Montana. Preliminary to any authorization to sell policies or the transaction of any business, state law requires the company to appoint the Commissioner of Insurance for service of process, which it did. Although the company began the licensure application process, the company cannot yet sell policies in Montana and has not completed the regulatory process to do so. The company has no contacts or contracts, no sales agents or producers, no employees, and no offices in Montana, nor has it filed insurance rates and other forms necessary to do business, solicited any business, advertised, sold any policies, collected any premiums, or transacted any business in Montana. The company is, in short, 99.99% "Montana free." Although it has done nothing more than dip its toe in the water to test the idea and preserve its option of doing business in Montana at some undetermined point in the future, the company now faces the prospect of being subject to general jurisdiction.

We hold that this toe—the mere appointment of an agent for service of process—does not subject the company to general personal jurisdiction in Montana. Numerous Supreme Court opinions and Montana law counsel that such testing of the waters does not constitute a generalized consent to be sued in Montana. Nor is the appointment of an agent for service of process sufficient to confer either general or specific personal jurisdiction over the company under our controlling standards.
The constitutional standard of "minimum contacts" has practical meaning in the context of personal jurisdiction. Mere appointment of an agent for service of process cannot serve as a talismanic coupon to bypass this principle. We therefore affirm the district court's dismissal of this suit for lack of personal jurisdiction.

Hrdlicka v.Reniff, No. 09-15768 (Janaury 31, 2011) Plaintiffs, Ray Hrdlicka and his publication Crime, Justice & America ("CJA"), brought two suits claiming that their First Amendment rights are being violated by the mail policies at two county jails in California that refuse to distribute unsolicited copies of CJA to inmates. The district courts in each case granted summary judgment to defendants after applying the four-factor test of *Turner v. Safley*, 482 U.S. 78 (1987).

In these related appeals, we conclude that questions of material fact preclude summary judgment to defendants. On this record, we cannot hold as a matter of law under *Turner* that defendants have sufficiently justified their refusal to distribute unsolicited copies of CJA to jail inmates. We therefore reverse and remand to the respective district courts.

Alameda Books, Inc. v. City of Los Angeles, No. 09-55367 (January 28, 2011) The issue in this case is the district court's grant of summary judgment against the City of Los Angeles on the grounds that the City's Ordinance for the dispersal of adult entertainment businesses violates the First Amendment. We reverse. The district court erred by granting summary judgment on the ssue whether the plaintiffs had presented

"actual and convincing" evidence "casting doubt" on the City's rationale for its Ordinance.

Preparing for Cell Phone Data Discovery

Cell phones are ubiquitous, and the data they hold may be critical to an investigation or litigation. In the recent case United States v. Suarez, 2010 WL 4226524 (D. N.J. Oct. 21, 2010), the court held that the Government violated its duty to preserve relevant text messages sent between a cooperating witness and FBI agents when the Government failed to retrieve the messages from the cell phones or from the FBI's network system. Ultimately, the court sanctioned the Government with an adverse inference instruction for the spoliation of discoverable data.

When the duty to preserve arises, it can be difficult to know how and what mobile device data must be included and what extra steps are needed to ensure relevant data is not lost. Preserving all data on every cell phone involved in an incident can be difficult and is sometimes not possible. Therefore, smart decisions must often be made quickly to determine which data to target and which methods to use in order to retrieve that data. Two important steps an organization should take include gaining an understanding of the unique nature of mobile device data collections and taking proactive measures to prepare for the event of litigation.

Cell Phone Collections

Data collections from cell phones differ considerably from those involving ordinary computer hard drives. Unlike desktop computers that use hard drives, cell phones rely on flash memory, which is smaller and in turn causes information to be written over more rapidly. This makes the data on cell phones more volatile and susceptible to overwriting, which in turn makes recovery of relevant data more difficult and time sensitive. Because cell phones are ever-changing devices, processing typically results in a snapshot of the data on the device at a specific point in time. Timeliness is therefore essential to preserve data that may be lost when a cell phone battery dies or to prevent the data from being overwritten through further usage of the device.

The methods available to process cell phones vary greatly depending on the make, model and carrier involved. What makes data recovery on these devices so difficult is the fact that there are a multitude of different and proprietary types of cell phones, all operating on different carrier networks. Phones containing proprietary technology require unique cables and adapters to extract data. In addition, the same exact phone may exhibit different data recovery potential depending upon the cellular network for which it is configured. Though cell phones may look identical on the outside, they are often exceedingly different internally, and this can sometimes lead to unexpected results for the inexperienced examiner.

Some categories of data may also require unique methods. While mobile device data may be synchronized with a corporate system that enables data retrieval (such as the Blackberry® Enterprise Server), the kinds of data available may vary with different systems. Also, various network or service providers may not necessarily provide the same storage systems or the ability to access the same kinds of data. For example, while e-mails sent from a cell phone over a company server may be available and stored on a corporate network, records of phone calls sent and received usually are not.

Krollontrack.com

Even after a successful collection, the data that is extracted from a given device may require manual analysis techniques and tools to interpret and read. In other words, the recovered data may not appear as plain and easy to read text, but as fragmented data that can be difficult to display for use by attorneys, judges and juries.

Preparing for Litigation

On the front end, the most essential steps an organization can take are effective research and planning in selecting which new technologies to invest in. It is important to consider what data will be available for collection and what equipment, software and techniques may be required for preservation. Involving legal counsel along with IT in this process will be beneficial, as counsel can decide in advance the types of data that may need to be preserved and collected when litigation ensues. Because different kinds of data are more easily retrieved on certain types of devices than others, considering in advance the ease with which you will be able to retrieve images, call logs, text messages (such as MMS and SMS), audio and video will make your litigations run more smoothly on the back end.

The legal standard concerning the duty to preserve evidence is fairly straightforward - when litigation is reasonably foreseeable, the duty to preserve relevant evidence arises. The more challenging questions concern what is or may be relevant, what must be done to preserve such evidence and evaluating whether the proper preservation steps were taken in any given situation. Once a request for information has been made, there is a duty to preserve it unless it is not relevant or the court agrees that it is too expensive, time-consuming or difficult to preserve.

To date there are still relatively few rulings on the admissibility of cell phone data, but the question is certainly arising more frequently in cases across many jurisdictions. Related questions increasingly confronting the courts involve company data retention policies and employee privacy issues relating to mobile device use. These questions cross over into determining what mobile device data is and is not discoverable. Undoubtedly, these sometimes contentious issues will continue to play out in courts in the months and years ahead.

Although the latest technologies are savvy and smart, the tools needed for cell phone data collections take some time to catch up. Data might be retrievable on older devices that cannot yet be recovered from newer ones. In addition, some devices can be remotely accessed or wiped using new "apps" with advanced features. The question often arises for management: "Should we standardize on a slightly older phone that is better understood in terms of what data can be recovered from it, or on the newest phone technology that may be less understood, but may also offer a greater selection of advanced applications to make our employees more productive?" This is a business decision for each company to make according to its own unique environment, and it can only be made intelligently when the security and data recovery characteristics of each device are sufficiently understood.

Ultimately, and in contrast to hard drive collections, more equipment and expert knowledge about different types of cell phones is required to perform successful collections. When organizations anticipate mobile device data collections, an expert provider can be consulted in order to plan for the effective preservation and collection of the data. Among their arsenal of

techniques, experts have the benefit of advanced testing. Moreover, in the event that an opponent challenges any preservation or collection practice, an expert can walk a court through the process of what was done, how, and why it was done, and explain the techniques used in order to help insure that extracted data will be admissible. Organizations should select a service provider who is prepared to accomplish these objectives.

E-DISCOVERY CASES

Document Dump of Servers Leads to Privilege Waiver

In re Fontainebleau Las Vegas Contract Litig., 2011 WL 65760 (S.D. Fla. Jan. 7, 2011). In this bankruptcy litigation, the defendant claimed the third party waived privilege by producing three servers in response to a subpoena and court orders without conducting a review for either privilege or responsiveness. Seeking to use the information but avoid any adverse consequences, the defendant offered to "eat" the cost of searching the massive document dump of approximately 800 GB and 600,000 documents for relevant materials in exchange for the right to review and use the data free of the obligation to appraise or return any privileged documents. Reviewing the third party's conduct, the court found that its failure to conduct any meaningful privilege review prior to production constituted voluntary disclosure and resulted in a complete waiver of applicable privileges. Noting that more than two months after production the third party had not flagged even one document as privileged, the court rejected its "belatedly and casually proffered" objections as "too little, too late." Accordingly, the court granted the defendant full use of these documents during pretrial preparations of the case, but ordered it to timely advise the third party of any facially privileged information it encountered upon review.

Court Excludes Witness and Video Evidence for Rule 26 Failure to Produce

Morris v. Metals USA, 2011 WL 94559 (D.S.C. Jan. 11, 2011). In this personal injury litigation, the plaintiff moved for sanctions including the exclusion of a witness and videotape from evidence. Alleging a "trial by ambush," the plaintiff argued the defendant failed to disclose the identity of a witness (an investigator) and corresponding surveillance videotape until six months after receiving the interrogatories and requests for production, and roughly one week prior to the discovery deadline. The defendant argued production was not required as it intended to use the evidence solely for impeachment purposes. Analyzing the evidence, the court found the tape could also serve a substantive purpose as the video showed the plaintiff performing normal daily activities and might contradict or diminish the plaintiff's quality of life claims. Despite a lack of bad faith, the defendant's violation of Fed.R.Civ.P. 26(a) and (e) was "not substantially justified nor harmless"; thus, the court prohibited the use of the investigator as a witness and the videotape as evidence at trial, but declined to impose further sanctions.

Court Affirms Attorney-Client Communications over Employer Computer Not Privileged

Holmes v. Petrovich Dev. Co., LLC, 2011 WL 117230 (Cal. App. 3 Dist. Jan. 13, 2011). In this employment litigation, the plaintiff appealed the trial court's finding that attorney-client communications sent over her work computer were not privileged. Regarding the transmission of electronic communications in the workplace, the court stated that privilege does not extend to when the employee uses the employer's sys-

tems, is advised that the communications are not private, and is aware of and agrees to these conditions. Although the attorney-client communication was sent via the employer's e-mail account and the plaintiff was informed of the usage policy, she argued communications were not monitored in practice and this contradiction provided her a reasonable expectation of privacy. Distinguishing the factual circumstances from City of Ontario v. Quon and Stengart v. Loving Care Agency, Inc., the court noted that "absent a company communication…explicitly contradicting" company policy, it is immaterial whether the company actually monitors communications. The court analogized the usage of an employer's communication systems to consulting an attorney in the employer's "conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard" and accordingly affirmed the trial court's finding that attorney-client privilege did not apply.

Court Urges Cooperation and Denies Additional Search for "Insignificant" ESI

United States v. Halliburton Co., 2011 WL 208301 (D.D.C. Jan. 24, 2011). In this qui tam action alleging fraud perpetrated against the United States, the plaintiff requested an order from the court requiring the defendants to search the electronic data of all employees who were copied on e-mails that were previously produced. The defendants argued that this search would encompass an additional 35 custodians that possess an average of 15 to 20 GB of data and that it would take two to ten days per custodian for the collection process before review could occur. Denying the plaintiff's request for additional searches, the court noted that the defendants had already spent "a king's ransom" of $650,000 on discovery and had produced more than 2 million paper documents, thousands of spreadsheets and more than half a million e-mails. Further, the court determined the plaintiff failed to demonstrate that any e-mails not produced were crucial to her claims.

Court Permits Non-U.S. Litigant to Seek American Discovery for Use in Foreign Litigation

Heraeus Kulzer, GMBH v. Biomet, Inc., Nos. 09-2858, 10-2639 (7th Cir. Jan. 24, 2011). In this foreign trade secrets litigation, the plaintiff appealed the district court's denial of its request for discovery in U.S. federal district court pursuant to 28 U.S.C. § 1782. Noting that discovery in the federal court system is broader than in most foreign countries, the court listed several potential abuses that could warrant a denial – including, inter alia, harassing the opposing party, "swamping a foreign court with fruits of American discovery" and gaining an arbitrary advantage through the lack of reciprocity in access to broad U.S. discovery. The court determined the defendant failed to demonstrate any such abuses, finding the plaintiff was not "seeking to circumvent German law" and successfully demonstrated a need for extensive discovery for aid in its foreign lawsuit. Next, asserting that the Federal Rules of Civil Procedure apply with respect to foreign discovery, the court found the defendant failed to demonstrate undue burden and refused to cooperate or negotiate directly with the plaintiff to modify the scope of discovery. Accordingly, the court reversed and remanded for consideration of the discovery request under federal discovery rules.

Reasonable Attorneys' Fees and Costs Top $1 Million in Egregious Discovery Misconduct Case

Victor Stanley, Inc. v. Creative Pipe, Inc., Case 8:06-cv-02662-MJG (D. Md. Jan. 24, 2011). In

Krollontrack.com

this ongoing intellectual property litigation, the parties disputed the amount of reasonable attorneys' fees and costs to be paid by the defendants as a sanction for intentional spoliation of evidence and other egregious misconduct during discovery. The plaintiff sought $936,503.75 in attorneys' fees and $148,297.04 in costs, while the defendants previously were ordered to pay $337,796.37. Noting that willful spoliation "taints the entire discovery and motions practice," the court refused the defendants' "shotgun approach" to narrow the costs sought. Concluding that $901,553 was the reasonable amount of the plaintiff's attorneys' fees, the court found that the "'time and labor required' to address Defendants' spoliation was commensurate with the magnitude of the spoliation itself." The court also awarded the proposed costs, including the expense of hiring a computer forensic consultant. In total, the court ordered the defendants to pay $1,049,850.04, with the balance of $712,053.67 due in 30 days.

Court Denies Privilege Waiver in Light of Reasonable Efforts to Prevent and Rectify Disclosure

Carlock v. Williamson, 2011 WL 308608 (C.D. Ill. Jan. 27, 2011). In this civil rights litigation, the defendants sought to seal or strike the plaintiff's motion for sanctions for the defendants' alleged spoliation of ESI. The defendants asserted that a litigation hold spreadsheet and an e-mail were inadvertently produced, and without these documents, the plaintiff's motion for sanctions was baseless. The plaintiff claimed any privilege was waived because it had been given "unfettered access" to the defendants' server. Addressing the litigation hold spreadsheet, the court determined it was an ordinary

business record not protected by work product doctrine and was discoverable based on the virtual absence of ESI produced by the defendants, which constituted a threshold showing that they failed to preserve documents. However, the court held the spreadsheet must be properly redacted and allowed the plaintiff to refile once the redaction was completed. Next, the court conducted a Rule 502 analysis and found that the defendants took reasonable steps to prevent and rectify disclosure of the privileged e-mail communication by obtaining and relying on a protective order, and engaging in several meet and confer sessions. Finding no waiver of privilege, the court granted the defendants' emergency motion to strike.

Court Affirms Default Judgment Sanction for Bad Faith Spoliation of ESI

Daynight, LLC v. Mobilight, Inc., 2011 WL 241084 (Utah App. Jan. 27, 2011). In this intellectual property dispute, the plaintiff and third-party defendants appealed the district court's decision to grant default judgment as a sanction for ESI spoliation. Rejecting the argument that the sanction was excessive and unduly harsh, the court noted that Rule 37(g) of the Utah Rules of Civil Procedure concerns discovery violations greater than simple discovery abuse (as opposed to Rule 37(b)(2)) and "does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Moreover, the court noted that even if such culpability was required, the appellants willfully and in bad faith destroyed ESI, as evidenced by a video wherein the appellants' employees spoke of their destruction of potentially harmful evidence. In addition, the employees committed such actions as "throwing the laptop off a building; running over the laptop with a vehicle; and stating '[If] this gets us into trouble, I hope we're prison buddies.'" Finding this behavior demonstrated bad faith and a general disregard for the judicial process, the court affirmed the default judgment and award of attorneys' fees and costs.

Judge Scheindlin Orders Production of Metadata under FOIA and Demands Cooperation

Nat'l Day Laborer Org. Network v. United States Immigrations and Customs Enforcement Agency, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011). In this Freedom of Information Act (FOIA) litigation, the plaintiffs sought to obtain records in a usable format from four government agencies that produced electronic text records, e-mails, spreadsheets and paper records in an unsearchable PDF format, stripped of all metadata and indiscriminately merged together in one PDF file. Determining the defendants' production did not comply with FOIA or Fed.R.Civ.P. 34, Judge Scheindlin remarked that "regardless of whether FOIA requests are subject to the same rules governing discovery requests, Rule 34 surely should inform highly experienced litigators as to what is expected of them when making a document production in the twenty-first century." Citing Aguilar v. Immigration and Customs Enforcement Division of the United States Department of Homeland Security, in addition to three state court decisions, Judge Scheindlin held that certain metadata is "intrinsic" to the electronic record. Accordingly, the Judge determined that parties may no longer produce a significant collection of static images of ESI without accompanying load files. In addition, "metadata maintained by the agency as a part of an electronic record is presumptively producible under FOIA, unless the agency demonstrates that such metadata is not 'readily reproducible.'" After ordering a detailed protocol for the defendants' production

and specifying the minimum metadata fields that must be included, the court concluded by commenting that the whole discovery issue could have been avoided "through cooperation and communication."

Despite Inadequate Preservation Efforts, Court Declines Sanctions Based on Retention of Forensic Expert

Trickey v. Kaman Indus. Techs. Corp., 2010 WL 5067421 (E.D. Mo. Dec. 6, 2010). In this employment discrimination litigation, the plaintiff sought production of all relevant electronic communications, alleging the defendants failed to adequately preserve electronic data in anticipation of litigation. Employees of the defendants manually selected and preserved documents and e-mails contained in the live database or archive that they deemed potentially relevant instead of preserving a mirror image of the e-mail server and relevant data sets. Although concerned by the defendants' failure to create a mirror image, the court declined to issue sanctions as the plaintiff made no spoliation claims and the defendants made considerable remedial efforts by hiring an independent forensic computer expert to examine the electronic data for relevant information. Based on this retention of the forensic IT consultant and efforts to search existing data, the court agreed that the requested documents no longer existed and denied the motion to compel unless the plaintiff could identify now-existing databases that were not previously searched.

Court Imposes Permissive Adverse Inference Instruction for Video Recording Destruction

Rattray v. Woodbury County, Iowa, 2010 WL 5437255 (N.D. Iowa Dec. 27, 2010). In this Fourth Amendment unreasonable strip search case, the plaintiff sought sanctions pertaining to the defendants' destruction of video evidence. The plaintiff argued her threats of litigation during the incident, her attorney's letter complaining about her treatment and a court order to preserve the video recording all put the police department on notice of imminent litigation such that they should have preserved the entire recording. Objecting, the defendants asserted that preserving only part of the recording complied with routine procedure, the plaintiff failed to demonstrate prejudice from the loss, the uncopied segment would have been automatically overwritten by the time the defendants received notice to preserve it and they did not act in bad faith. Finding sufficient evidence to constitute a fact question, the court ordered the question of bad faith be submitted to the jury and included a permissive adverse inference instruction.

Court Upholds Government's Search and Seizure Despite Acknowledging Right to Privacy in E-Mail Communications

United States v. Warshak, 2010 WL 5071766 (C.A.6 (Ohio) Dec. 14, 2010). In this criminal case, the defendants appealed their numerous convictions for fraud claiming the government violated the Fourth Amendment prohibition against unreasonable search and seizures by obtaining private e-mails without a warrant. The defendants also argued that the government turned over immense quantities of discovery in a disorganized and unsearchable format, that the government violated its Brady obligations by producing "gargantuan 'haystacks' of discovery" and that the district court erroneously denied a 90-day continuance to allow the defendants to finish sifting through the "mountains of discovery." Addressing the Fourth Amendment concerns, the court first found the defendant plainly manifested an expectation that his e-mails would remain private given the sensitive and "sometimes damning substance" of the e-mails,

Krollontrack.com

viewing it as highly unlikely the defendant expected the e-mails to be made public as people "seldom unfurl their dirty laundry in plain view." Next, the court determined that it would defy common sense to treat e-mails differently than more traditional forms of communication and found that neither the possibility nor the right of access by the Internet Service Provider (ISP) is decisive to the issue of privacy expectations. Based on these conclusions, the court held the government may not compel an ISP to turn over e-mails without obtaining a warrant first. However, the court ultimately found the government relied in good faith on the Stored Communications Act in obtaining the e-mails and determined the exclusionary rule does not apply. Turning to the "prodigious" volume of discovery that consisted of millions of pages, the court disagreed with the defendants' arguments, noting in particular that Fed.R.Crim.P. 16 is silent on what form discovery must take.

Gaddafi's Last Shot

Facebook Status: No Expectation of Privacy

Like any other electronic evidence, information communicated through social media – such as Facebook, MySpace or Twitter – is discoverable if it is reasonably likely to be relevant, is non-privileged and is not deemed overly prejudicial. Nevertheless, as is common when new technologies hit mainstream, the discoverability of these mediums has not seen a swift response

by the courts. Further, the courts that have addressed these sites often differ in their analysis and conclusions, lending an air of unpredictability. Despite the inconsistencies and the fact that there are still relatively few cases involving social networking sites in the civil arena, important lessons can be gained in examining these rulings and potential evidence gold mines.

To date, the most prominent issues that are disputed in social media e-discovery cases involve the questions of privacy and, by extension, relevance. For example, addressing privacy concerns in an artwork licensing dispute, *Crispin v. Christian Audigier, Inc*., 2010 WL 2293238 (C.D. Cal. May 26, 2010), the District Court of Central California ruled that under the Stored Communications Act (SCA), messages sent on Facebook and MySpace are private and do not need to be produced during discovery in a civil lawsuit. Furthermore, "wall postings" may be private depending on a user's privacy settings. In other words, if Crispin had restricted his wall postings to be viewable only by his "friends," his status updates would be considered private.

In at least three other cases, however, courts have ruled that wall postings are discoverable regardless of privacy settings, and have even concluded that e-mail communications sent over social networking sites may not be considered private. A notable similarity in these three cases was that the courts determined the information sought was particularly likely to be relevant to explore claims put at issue by the opposing party.

First, in *Romano v. Steelcase Inc*., 907 N.Y.S.2d 650 (Sept. 21, 2010) a personal injury action, the court allowed the defendant broad access to the plaintiff's current and historical Facebook and MySpace pages to look for information inconsistent with the plaintiff's claims concerning the extent and nature of her injuries. Having found relevant information on the public portions of these sites, the court deemed it reasonably likely that the private portions would be similarly useful. Like Crispin, this case involved analysis under the SCA. However, recognizing that Facebook and MySpace published privacy disclaimers, and that the stated purpose of such sites is sharing personal information, the court emphatically remarked that "privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

A different court followed an almost identical line of reasoning in another personal injury case, *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (C.P. Jefferson Sept. 9, 2010) and held that both the public and private portions of the plaintiff's social networking sites were discoverable in order to disclose information as to whether he exaggerated his injuries. Finding no reasonable expectation of confidentiality or a need for privilege outside of attorney-client communications, the court ordered the plaintiff to preserve information contained on his social networking sites and to provide his user names and passwords to opposing counsel.

In *Equal Employment Opportunity Commission v. Simply Storage Management*, LLC, 270 F.R.D. 430 (S.D. Indiana 2010), the Southern District of Indiana ordered production of Internet social networking site profiles and other communications from Facebook and MySpace accounts. In this employment discrimination case, the court expressly included in the meaning of "profiles" the postings, pictures, blogs, messages, personal information, lists of

Law.com

"friends" or causes joined that the user placed or created online through her account. Also, similar to *Romano* and *McMillen*, the court denied a party's privacy claim barring the need for production where the party placed the emotional health of the particular claimants at issue. Presaging the sentiments expressed in *Romano*, the court stated, "Facebook is not used as a means by which account holders carry on monologues with themselves," and held that content is not shielded from discovery simply because it is "locked" or "private."

Interestingly, *EEOC* stands in contrast to *McMillen* and *Romano* on a key point. Rather than allowing broad access or requiring production of passwords, the EEOC court addressed concerns about relevance by calling on counsel "to make judgment calls – in good faith and consistent with their obligations as officers of the court – about what information is responsive to another party's discovery requests. … Discovery is intended to be a self-regulating process that depends on the reasonableness and cooperation of counsel." *Id*.; *see also Mackelprang v. Fidelity Nat'l Title Agency*, 2007 WL 119149 (D. Nev. 2007) (court declines to compel production but instructs defendant to follow ordinary discovery procedures to request relevant and not overly-prejudicial e-mail communications sent through social networking sites)

Finally, a unique case on the topic of social networking was issued by the Middle District of Tennessee in June 2010. In the case, *Barnes v. CUS Nashville, LLC*, the magistrate judge offered to create a Facebook account which would allow the witnesses to accept the judge as a "friend" for the sole purpose of reviewing photographs and related comments in camera. Following this review, the account would be deleted. In addition, the magistrate judge reviewed submitted materials from the plaintiff's Facebook account and found one message, seven pictures and the accompanying metadata to be relevant to the case.

The overall trend of the judiciary seems to be moving toward greater permissiveness for e-discovery with regard to social media, as well as a strong likelihood that privacy concerns will be outweighed by the weight and relevance of the information. Consequently, as corporate use of social media continues to increase, counsel's role should include advising clients on best practices for social media e-discovery, employee usage policies and corporate practices.

Saving Souls One (1) Lawyer at a Time

Over at The Appellate Record blog, Kendall Gray is **on a mission** to save at least one soul from the "purgatory of legalism." He is doing so by pointing out the inane practice, which still continues in many law offices (you know who you are), of writing legal memos or letters as if you were writing a check. Like this:

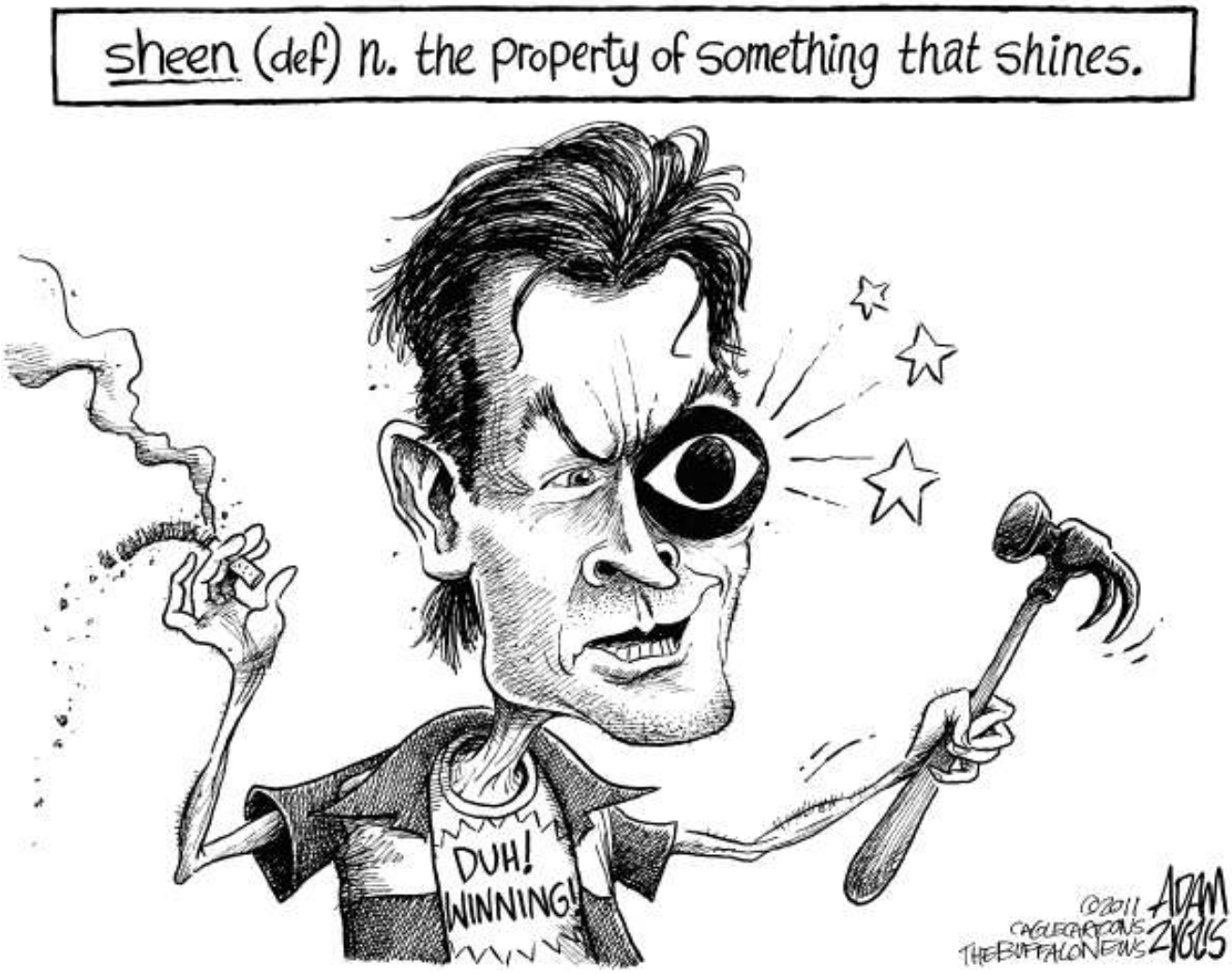
Five (5) days ago, or maybe it was six (6), I got one (1) e-mail from a blog reader and appellate-lawyer-colleague.

Gray says this kind of writing makes his "head explode." Amen to that! He explains that writing to make something appear more "legal," like when people insist on additionally placing numbers within parentheses, falls within the "class of edits that make a brief objectively worse than it was before" and has the effect of:

1. (one) interfering with the narrative;
2. (two) obscuring the argument;
3. (three) annoying the reader; and
4. (four) generally just sounding dumb.

Law.com

Gray adds that human beings don't need this kind of help in reading a document. Neither do lawyers, for that matter. If Legal Blog Watch can help Gray save even one (1) lawyer from perpetuating this practice, it will have been a good day!



Pimp Law: Are You Offering Pimp Services if the Woman Is Already 'in the Game?'

There is such a thing as California pimp law, and on March 8 the California Supreme Court will hear argument in a case that will help define it.
The Associated Press reports that in 2007, Jomo Zambia was in his car at a "notorious intersection" in the San Fernando Valley known for its prostitutes. He allegedly asked a woman he believed to be a prostitute to enter his car, explained he was a pimp, and offered his pimp services, "which included providing housing and clothing, if she turned over all of her money to him."

The prostitute was actually an LAPD Officer working undercover, and Zambia was arrested and later convicted of the crime of pandering, as one who "induces, persuades or encourages an-

Law.com

other person to become a prostitute." California's highest court will now examine whether a defendant like Zambia can be convicted of encouraging another person to become a prostitute when that person *already* appears to be working as a prostitute. Or, in AP writer Paul Elias' words, the court will define "what makes a pimp in California."

Zambia's lawyer, Vanessa Place, argues that the law is directed at people who recruit innocent victims into the "game," and not at people who are simply attempting to persuade an already working prostitute to "change management." The California attorney general's office counters that there is "no way lawmakers intended to let suspects like Zambia off the hook."

According to The Associated Press, there is some precedent in Zambia's favor. In 2009, a lower appellate court "reluctantly" reversed a conviction because "[i]f the Legislature had wanted a more broadly applicable provision, it could have easily replaced the phrase 'become a prostitute' with the phrase 'engage in prostitution.'"

'The Write Report' Helps Fictional Characters Realistically Navigate the Law

Via the PrawfsBlawg I came across an interesting blog called The Write Report. On The Write Report, Donna Ballman, author of The Writer's Guide to the Courtroom: Let's Quill All the Lawyers, analyzes law as it is portrayed on television and responds to writers' questions about how they can accurately have their fictional characters navigate the civil justice system.

For example, a person named J Katrin asked how a character with amnesia might realistically be able to obtain gainful employment in the real world:

If a character cannot remember who she is, and authorities are for whatever reason unable to discover her identity, what options are there for obtaining gainful employment, etc.? Without a birth certificate, you can't be issued an SSN, so what can you do if you don't have someone to take care of you and aren't considered dangerous enough to house in a prison or psych ward?

Ballman conducted some research and responded that J Katrin's plotline did have a potential solution:

In these days of Homeland Security, immigration concerns, and crackdowns on employers hiring undocumented workers, your character with amnesia will have a tough time. Their best bet will be to hire a lawyer to try to get a court order to issue a new Social Security card. Otherwise, they?ll have no driver?s license, passport, work permit, entitlement to government benefits ? nothing.

The Write Report includes a number of other interesting posts for writers interested in touching on legal topics, including "Who Might Your Murderer Character Want to Kill Off (Besides Lawyers)? Six People Who May Just Need to be Murdered" (sorry, legal secretaries, but you are No. 1 on this Hit List).

Please Don't Tweet and Drive

Back on Aug. 16, 2010, I innocently stated:

> Ever since I got Twitter installed on my BlackBerry, it has occurred to me that we cannot be far away from a time when we will regularly be reading articles with headlines such as "Six Car Pileup Results After Man Checks TwitterFon

Law.com

> on Beltway" or "Local Woman Walks Into Manhole While Posting TwitPic."
>
> And yet, to date, I have not seen any car crashes, boat wrecks, slip-and-falls or any of the other things I expected directly attributed to Twitter. Are they out there? Are there other types of cases out there where damages, injuries or even crimes are being connected back to people using Twitter?

I'm not trying to get all "Nostradamus" on you, but I think we can now all agree that Aug. 16 marked the end of a simpler age, when humans did not bring great harm to themselves and others because they were trying to provide updates about their "status" to other humans who probably didn't give a hoot anyway.

As I mentioned here, the very next day (Aug. 17, 2010), a well-known plastic surgeon named Frank Ryan was killed when he accidentally drove his car over a cliff while sending a Twitter message about his border collie, Jill.
This was followed by the woman who, while texting a friend, walked directly into the concrete surround of a fountain and fell headfirst, fully clothed, into the water.
And last week brought the sad news of a woman who has been sued in a wrongful-death lawsuit for allegedly fatally striking a pedestrian while updating her Facebook page on her cell phone.

There are, no doubt, many more stories like this. The last six months have surely proven that humans are not always capable of tweeting, Facebooking or texting while driving, and sometimes even while walking.

Please be careful and put down the Twitter while driving!

The Arrow Principle: Trademark Protection for Fictitious Brands

Can I start a newspaper called *The Daily Planet*?
Can a new beer company start selling a beer called "Duff?" (**click here** -- and you should also probably start watching "The Simpsons" -- if you aren't familiar with Duff beer).
Can someone roll out a new eyewear device called the "**Opti-Grab**?"

These questions and more are addressed in a new law review article entitled "**Real-Life Protection for Fictional Trademarks**" (via **Entertainment & Media Law Signal**) by Benjamin Arrow, a student at Fordham University School of Law. In short, Arrow argues that following the logic of two court decisions -- one in the United States and one in Australia -- taking any of the actions above would constitute a trademark injury to the fictional brands.

Arrow looks at some of the difficulties of applying trademark law to fictional brands, such as the tricky issue of whether a fictional brand is really being used in commerce. Using the Duff beer example, he says that
While Duff Beer is itself a brand name (albeit a fictional one) Duff would have had to have used the mark in commerce to reserve rights in the mark. That being so, the court would have to find that Fox and [Simpsons creator Matt] Groening's use of "Duff" within the fictional world of Springfield is sufficient to establish priority in the mark such that another's use of that mark would constitute trademark infringement.

Ultimately, Arrow suggests a legal framework for such disputes that "borrows analytical prin-

Law.com

ciples from copyright to determine what a use in commerce sufficient to reserve priority in a mark might look like for a fictional trademark, and to determine if a fictional trademark has been infringed."

As

Mr. Arrow is a 3L in law school and appears to be the first one to have thought this through, I hereby declare this new approach in fictional trademark cases to be known as The Arrow Principle.

'Conference Call Bingo' Turns Your Pain Into a Game

Via the Inter-Alia blog I came across a new way to deal with even the most painful of conference calls: Conference Call Bingo! There is probably nobody out there who has not had to deal with the pitfalls of the modern-day conference call: crying babies or dogs barking on the line of the person working from home; the dude calling in from his cell phone with bad reception; the lady dialing in from the airport with flight announcements on the P.A. system interrupting every 30 seconds; the loud talker; the soft talker; the foreign accent-talker you cannot understand; the two people who keep talking over each other; the business-speak cliches you must endure ("at the end of the day"); and so on.

With Conference Call Bingo, however, you can turn these landmines into a game, and perhaps preserve some of your sanity in the process. See if you can string together five-in-a-row to get Bingo on your next conference call, and even share your score on Facebook. Click on the image below to see the full-size Conference Call Bingo game.